

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT WILLIAM WOODBURY,

Defendant-Appellant.

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UNPUBLISHED

June 18, 1999

No. 208974

Mecosta Circuit Court

LC No. 97-004015 FC

Before: Neff, P.J., and Hood and Murphy, JJ.

PER CURIAM.

Defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), and sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to forty to ninety years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first challenges the trial court's decision to admit other acts evidence under MRE 404(b). We review a trial court's decision to admit evidence under MRE 404(b) for whether the trial court abused its discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). To be admissible under MRE 404(b), other acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose; (2) it must be relevant; and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998). In this case, a deputy sheriff testified about a previous incident in which defendant "hog-tied" his wife, drove her to a secluded area, and abused, humiliated, and threatened her. After carefully examining the record, we conclude that, even if the trial court did err in admitting this evidence, the error was harmless in light of the other evidence of defendant's guilt. Specifically, the victim's physical condition and demeanor were observed immediately following the alleged assault, and she manifested both physical and emotional signs of having been sexually assaulted. Further, the victim was able to describe the assault in particular detail immediately after it occurred. Finally, four witnesses who happened upon the assault observed the victim in distress, trying to escape from defendant. In light of this untainted evidence of defendant's guilt, we conclude that it is highly

probable that the other acts evidence did not contribute to the verdict. See *People v Mitchell (On Remand)*, 231 Mich App 335, 338-340; 586 NW2d 119 (1998).

Defendant next claims that the deputy sheriff's testimony concerning the statements of defendant's wife constituted inadmissible hearsay. This argument, however, merely represents another method for contending that the other acts evidence was inadmissible. Because we have concluded that it is highly probable that the other acts evidence did not contribute to the verdict, we decline to address whether the trial court erred in admitting the evidence pursuant to MRE 803(2).

Defendant next argues that his conviction should be reversed because of prosecutorial misconduct during closing argument. The test for prosecutorial misconduct is whether the statements denied defendant a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Here, the prosecutor twice stated that defendant lied. On both occasions, defendant's objections were sustained, and on the second occasion, the trial court told the prosecutor, in front of the jury, "you can't express your own opinion . . . ." Because the prosecutor only briefly injected his opinion with respect to defendant's credibility, and because defendant's objections were sustained on both occasions, defendant was not deprived of a fair and impartial trial on the basis of these statements. Defendant's remaining claims of prosecutorial misconduct were not objected to and, because we find no miscarriage of justice, we decline to review them. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

In a related argument, defendant contends that he was denied the effective assistance of counsel. We reject this claim. Defendant has failed to show that counsel's performance was objectively unreasonable and that he was prejudiced by counsel's defective performance. *People v Mitchell*, 454 Mich 145, 164; 560 NW2d 600 (1997).

Finally, defendant challenges the proportionality of his sentence. We find that the trial court stated appropriate reasons for the sentence imposed; the sentence was commensurate with the seriousness of the offense defendant committed and defendant's criminal history. *People v Lemons*, 454 Mich 234, 260; 562 NW2d 447 (1997).

Affirmed.

/s/ Janet T. Neff  
/s/ Harold Hood  
/s/ William B. Murphy